

Internal Revenue Service

Number: **202021004**
Release Date: 5/22/2020
Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
_____, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-118934-19
Date:
January 08, 2020

TY:

Legend:

Applicants	=
Year at Issue	=
\$N	=
\$Q	=
\$E	=

Dear _____:

This letter responds to your July 23, 2019, letter ruling request. That request relates to your taxable Year at Issue, and was made pursuant to sections 301.9100-1 and 301.9100-3, Proc. & Admin. Regs.¹ Your request seeks the Commissioner's permission to revoke your election to treat net long-term capital gain and qualified dividends as investment income under section 163(d)(1) and (4)(B), and section 1.163(d)-1, Income Tax Regs. (section 163(d)(4)(B) election).

FACTS

Applicants represent the following:

Applicants are retired individuals. As relevant here, Applicants' taxable income for the year at issue included \$Q in qualified dividends and \$N in net capital gain.

During the year at issue, Applicants incurred investment interest expenses totaling \$E.

¹ All section references are to the Internal Revenue Code and regulations in effect for the year at issue.

Applicants self-prepared their Form 1040, U.S. Individual Income Tax Return (return) for the year at issue, without the assistance of any computer software and without seeking any professional advice. On that return, Applicants elected to itemize their deductions. In doing so, Applicants understood that in order to claim a deduction for their investment interest expenses, they would need to make a section 163(d)(4)(B) election, an election to treat an amount of their qualified dividend and capital gain income as “investment income”.

Accordingly, Applicants made their section 163(d)(4)(B) election by completing a Form 4952, Investment Interest Expense Deduction (Form 4952), and claimed an investment interest deduction of \$E on the Schedule A, Itemized Deductions, attached to their return for the year at issue.

On their Form 4952, however, Applicants inadvertently elected to treat the entirety of their qualified dividend and capital gain income as investment income, an amount far exceeding the amount necessary to permit their \$E deduction for investment interest expense for the year at issue.

This error had the unintended effect of rendering of Applicants’ qualified dividend and capital gain income ineligible for taxation at capital gains rates, and instead subjected that income to taxation at ordinary income rates. See sec. 1.163(d)-1(a), Income Tax Regs. In reporting their tax due for the year at issue, however, Applicants failed to account for the excessive nature of their section 163(d)(4)(B) election, and erred by failing to compute their tax in a manner consistent with that election.

Applicants timely filed their return for the year at issue. Subsequently, the Service discovered the error in Applicants’ tax computation and corrected that error in a manner consistent with the scope of the section 163(d)(4)(B) election reported on Applicants’ Form 4952. As a result, the Service notified Applicants that they owed additional tax, additions to tax, and interest for the year at issue.

On July 23, 2019, Applicants filed the present letter ruling request, seeking an extension of time and permission to revoke their section 163(d)(4)(B) election for the year at issue, pursuant to sections 301.9100-1 and 301.9100-3, Proc. & Admin. Regs.

The period of limitation on assessment under section 6501(a) for the year at issue has not expired.

LAW

Section 163(d) provides that, in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest shall not exceed the net investment income of that taxpayer for the taxable year.

Section 163(d)(4)(B) provides, in part, that investment income is the sum of:

- (i) gross income from property held for investment (other than gain taken into account under clause (ii)(I),
- (ii) the excess (if any) of --
 - (I) the net gain attributable to the disposition of property held for investment, over
 - (II) the net capital gain determined by only taking into account gains and losses from dispositions of property held for investment, plus
- (iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause

Further, a taxpayer may also elect to take all or a portion of qualified dividend income into account as investment income. Sec. 163(d)(4)(B) (flush language).

A taxpayer electing to treat qualified dividend and certain net capital gain income as investment income must make such an election on or before the due date (including extensions) of that taxpayer's Federal income tax return for the year in which net capital gain is recognized or the qualified dividend income is received. Sec. 1.163(d)-1(b), Income Tax Regs.

As a consequence of making such an election, the qualified dividend and net capital gain income subject to that election will be rendered ineligible for taxation at the capital gains rates. Sec. 1.163(d)-1(1), Income Tax Regs.

A taxpayer's election, in this regard, may only be revoked with the consent of the Commissioner. Sec. 1.163(d)-1(c), Income Tax Regs.

Applicants are requesting permission to revoke their section 163(d)(4)(B) election to treat the entirety of their qualified dividend and net capital gain income as investment income. This is analogous to those situations concerning taxpayers who fail to make a particular regulatory election and subsequently seek an extension of time to do so pursuant to sections 301.9100-1 and 301.9100-3, Proc. & Admin. Regs. See Rev. Rul. 83-74, 1983-1 C.B. 112.

As applicable here, sections 301.9100-1 and 301.9100-3, Proc. & Admin. Regs., provide the standards that the Commissioner uses when determining whether to grant a taxpayer's request for an extension of time for the making of a regulatory election.

A "regulatory election" is an election whose due date is prescribed by a regulation published in the Federal Register, a revenue ruling or procedure, or notice or announcement published in the Internal Revenue Bulletin. Sec. 301.9100-1(b), Proc. & Admin. Regs.

A taxpayer's request for an extension of time to make a regulatory election will be granted when the taxpayer provides evidence (as described in the regulations) that establishes to the satisfaction of the Commissioner that the taxpayer acted reasonably

and in good faith despite its failure to timely make that regulatory election, and granting relief will not prejudice the interests of the Government. Sec. 301.9100-3(a), Proc. & Admin. Regs.

A taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(1), Proc. & Admin. Regs. These benchmarks are disjunctive and, as such, a taxpayer only need satisfy one in order to be deemed to have acted reasonably and in good faith. Vines v. Commissioner, 126 T.C. 279, 291 (2006).

Conversely, a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

- (i) seeks to alter a return position for which an accuracy related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested;
- (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief.

Sec. 301.9100-3(b)(3), Proc. & Admin. Regs.

Further, if specific facts have changed since the original due date for making the election that would render the election more advantageous to a taxpayer, the Commissioner may decline to grant relief. Sec. 301.9100-3(b)(3)(iii), Admin. & Proc. Regs. In this sense, "the relevant inquiry is whether allowing a late election gives the taxpayer some advantage that was not available on the date due." Vines v.

Commissioner, 126 T.C. at 293.

Section 301.9100-3(c)(1), Proc. & Admin. Regs. provides that the Commissioner will not grant an extension of time if the interests of the Government will be prejudiced by the granting of that extension. For example, the Commissioner may find that the interests of the Government are prejudiced when granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years impacted by the election when compared against the taxpayer's liabilities that ought to have resulted had the taxpayer made a timely election (taking into account the time value of money). Sec. 301.9100-3(c)(1)(i), Proc. & Admin. Regs.

Further, the Commissioner may determine that the interests of the Government will be prejudiced if the period of limitations on assessment under section 6501(a) for the taxable year in which the election should have been made, or any taxable years that would have been impacted by the election had it been timely made, has closed or will be closed before the taxpayer's receipt of a ruling ostensibly granting relief. Sec. 301.9100-3(c)(1)(ii), Proc. & Admin. Regs.

ANALYSIS

Applicants' request, here, pertains to a regulatory election as defined in section 301.9100-1(b), Proc. & Admin. Regs., because the due date for making a section 163(d)(4)(B) election is prescribed by section 1.163(d)-1(b), Income Tax Regs. Accordingly, the Commissioner has the authority under sections 301.9100-1 and 301.9100-3, Proc. & Admin. Regs., to grant Applicants' request for an extension of time to revoke their section 163(d)(4)(B) election for the year at issue.

The information submitted, and representations made by Applicants establish that they acted reasonably and in good faith under section 301.9100-3(b)(1) and (2), Proc. & Admin. Regs. Applicants made their section 163(d)(4)(B) election after exercising reasonable diligence in the preparation of their Federal income tax return for the year at issue. Despite exercising reasonable diligence, Applicants inadvertently elected to treat their entire qualified dividend and net capital gain income as investment income, an amount far greater than necessary to claim their associated investment interest deduction. In this sense, the dollar value of Applicants' election itself reveals that they were not fully informed with regard to all material aspects of the section 163(d)(4)(B) election and its related tax consequences, notwithstanding Applicants having undertaken sufficient due diligence in researching that election and its relation to the investment interest deduction.

Accordingly, Applicants will be considered to have acted reasonably and in good faith. Sec. 301.9100-3(b)(1)(iii) and (3), Proc. & Admin. Regs.

Moreover, based on Applicants' representation of the facts, granting an extension of time to revoke their section 163(d)(4)(B) election will not prejudice the interests of the government under section 301.9100-3(c)(1). Applicants have represented that granting

relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than would have resulted had they timely made and correctly applied that election (taking into account the time value of money). Further, Applicants have represented that the period of limitations on assessment under section 6501(a) has not closed for the taxable year at issue, or for any taxable years that would have been affected had Applicants timely made and correctly applied that election.

CONCLUSION

Based solely on the facts submitted and the representations made, we conclude that Applicants acted reasonably and in good faith, and that granting their request will not prejudice the interests of the government. Accordingly, the requirements of sections 301.9100-1 and 301.9100-3(b)(1) of the regulations have been satisfied.

The consent of the Commissioner is hereby granted to revoke Applicants' election under section 163(d)(4)(B) to treat net capital gains and qualified dividends as investment income for the year at issue. The extension of time to revoke this election shall be for a period of 60 days from the date of this ruling, and is to be made by filing an amended return for the year at issue.

This ruling is limited to providing an extension of time to revoke the Applicants election under section 163(d)(4)(B) for the year at issue. Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this ruling under any other provision of the Code. In particular, no opinion is expressed (1) as to whether any of Applicants' interest expense qualifies as a deductible interest expense, or (2) as to the proper characterization of, or the tax rates applicable to, any items of Applicants' income.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

A copy of this ruling must be attached to Applicants' Federal income tax returns for the tax years affected. Alternatively, if Applicants file their returns electronically, they may satisfy this requirement by attaching a statement to their return that provides the date and control number of this letter ruling.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling

showing the deletions proposed to be made in the letter when it is disclosed under section 6110 of the Code.

Sincerely,

BRINTON WARREN
Chief, Branch 3
Office of the Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy of the letter for section 6110 purposes

cc: